IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. R.M.H.,[†] Appellant.	No. 37433-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — R.M.H. appeals his juvenile adjudication of guilt for second degree burglary, second degree theft, and minor in possession of alcohol, arguing that he was denied effective assistance of counsel. Specifically, R.M.H. contends that his counsel was ineffective for failing to move to suppress evidence seized during what R.M.H. argues was an unlawful search of his bedroom. Because R.M.H.'s mother validly consented to the search of R.M.H.'s bedroom, we affirm.

[†] Because of the nature of this case, some confidentiality is appropriate. Accordingly, this court has determined pursuant to RAP 3.4 that the name of the juveniles involved will not be used in the case caption or the body of this opinion.

FACTS

Factual Background

Lewis County Deputy Sheriff Jason Mauermann was dispatched to the All In Restaurant and Lounge early on the morning of December 14, 2007, following a report of a burglary of the business. The lower portion of the large window in the front of the restaurant was broken. There was glass on the ground and a small amount of fresh blood on the lower window sill. Mauermann found an orange hammer near the broken window. Inside the restaurant, deputies found bottles of alcohol on the floor in the area behind the bar. They also found a broken bottle in the middle of a road near the restaurant, as well as nine or ten alcohol bottles hidden in the bushes slightly further down the road, away from the restaurant.

R.M.H. and his friends, A.G. and C.C., were suspects in a previous burglary with a similar modus operandi. Deputies went to a nearby apartment complex where R.M.H., who was 15 years old, lived with his mother. They saw a small amount of blood on the stairs and on the handrail leading up to the apartment. R.M.H.'s mother answered the door and allowed Deputy Mauermann and two other officers to enter her apartment. R.M.H. was taking a shower. When his mother told him that the deputies were there, R.M.H. got out of the shower and spoke with the officers. R.M.H. denied any involvement in the burglary and told Mauermann that he had been sleeping all night and was taking a shower in order to get ready to go to school. R.M.H. did not have any cuts on his body and was not bleeding.

R.M.H.'s mother gave Deputy Mauermann written consent[1] to search R.M.H.'s room in order to determine whether R.M.H. had been involved in the burglary and theft at the All In

[1] R.M.H.'s mother signed a consent to search form that the deputies provided for her.

Restaurant and Lounge. They did not ask R.M.H.'s permission to search his bedroom. Gloves that had glass particles in the palm area as well as some blood were found in R.M.H.'s bedroom. They also found a jacket with glass particles on it and shoes that were wet and appeared to have glass in or on them. In addition, deputies discovered that R.M.H. had displayed numerous empty alcohol bottles on his window sill. They also searched a cupboard in R.M.H.'s room and discovered a bottle of Black Velvet and a bottle of Goldschlager, both of which still contained alcohol.

R.M.H. told deputies that there was glass in his shoe because he had gone outside to smoke and stepped on a broken ashtray. R.M.H. also stated that two of his friends, A.G. and A.F., had come to his mother's apartment with alcohol and then left. Deputies arrested A.G. and C.C. shortly after they arrested R.M.H.; A.G. and C.C. were discovered at a nearby convenience store waiting for a bus to take them back to their home in Mossyrock. A.G. had cuts on his hands.

At Trial

At a nonjury juvenile fact-finding hearing, C.C. testified that he and A.G. left their house in Mossyrock and went to R.M.H.'s mother's apartment. R.M.H., C.C., and A.G. then walked about a quarter of a mile to the All In Restaurant and Lounge. C.C. testified that A.G. broke one of the restaurant's windows with an orange hammer, and R.M.H. crawled through the window and went inside. R.M.H. then passed approximately 30 or 31 bottles of alcohol through the window to C.C. and A.G.; some of these bottles broke in the parking lot and the boys hid some of the remaining bottles in the bushes between the restaurant and R.M.H's mother's apartment. Although they did not take all of the bottles with them, C.C. testified that they took a bottle of

Yukon Jack and a bottle of Goldschlager back to R.M.H.'s mother's apartment where they were drinking until they saw police car lights outside the building. When the deputies arrived, C.C. and A.G. went to a nearby store to wait for a bus to take them home, but deputies arrested them before the bus arrived.

R.M.H. testified that after A.G. and C.C. came to his home, he went outside to smoke a cigarette and stepped in glass from a broken ashtray. R.M.H. testified that shortly thereafter, he, A.G., and C.C. walked to the All In Restaurant and Lounge. According to R.M.H., C.C. brought up the idea of breaking into the restaurant, but R.M.H. thought he was joking and started to walk back to his mother's apartment. R.M.H. testified that C.C. and A.G. came back to the apartment approximately 20 minutes later with four or five bottles of alcohol. R.M.H. testified that he asked C.C. to hide them outside because he did not want them in the apartment. R.M.H. claimed that C.C. took some of the bottles outside, but left two bottles in R.M.H.'s room, which they all drank until deputies arrived. R.M.H. denied breaking into the restaurant or acting as a lookout for his friends. R.M.H. also testified that C.C. and A.G. left at about 5:30 am, when they saw police car lights outside the building. R.M.H. stated that A.G. and C.C. had left their gloves behind when they ran from the apartment.

The trial court determined that R.M.H. had fully participated in the burglary with A.G. and C.C. and found him guilty on all three counts. The trial court ordered confinement of 10 days for each count, to be served consecutively, and 15 months of community supervision. The trial court also ordered restitution in the amount of $1,316.16, and ordered that R.M.H., A.G., and C.C. be held jointly and severally liable for the amount.

R.M.H. timely appealed.

ANALYSIS

R.M.H. contends that he was denied his right to effective assistance of counsel because his trial counsel failed to move to suppress evidence seized during what R.M.H. argues was an unlawful search of his bedroom. The State responds that R.M.H.'s trial counsel was not deficient because R.M.H.'s mother properly consented to the search and, thus, the trial court would have denied a motion to suppress the evidence discovered in R.M.H.'s bedroom. We agree with the State.

Ordinarily, challenges to the legality of a search cannot be raised for the first time on appeal because, although they are constitutionally based, the record is not fully developed for review. *State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995) (a defendant who fails to move to suppress evidence allegedly illegally obtained waives any error associated with the admission of the evidence). But R.M.H. does not directly challenge the search. Instead, he alleges that his trial counsel was ineffective because his attorney failed to move to suppress[2] the evidence seized from R.M.H.'s bedroom.

Effective assistance of counsel is guaranteed under the federal and state constitutions. *See* U.S. Const. amend VI; Wash. Const. art. I, § 22. To prove ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient and (2) that deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Counsel's performance is deficient when it falls below an objective standard of reasonableness.

[2] CrR 3.6 states in relevant part that "[m]otions to suppress . . . evidence . . . shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities. . . . (b) . . . If any evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law."

State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). There is a strong presumption that counsel was effective, and counsel's conduct cannot support a claim of deficient performance if we can characterize it as a legitimate trial strategy or tactic. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). An attorney has no duty to argue frivolous or groundless matters before the court. *State v. Stockman*, 70 Wn.2d 941, 946, 425 P.2d 898 (1967). And we will defer to trial counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland v. Washington*, 466. U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

When a claim of ineffective assistance of counsel is based on trial counsel's failure to challenge the admission of evidence, the defendant must demonstrate (1) an absence of legitimate strategic tactical reasons supporting the challenged conduct, (2) that the objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Hendrickson*, 129 Wn.2d 61, 80, 917 P.2d 563 (1996); *State v. McFarland*, 127 Wn.2d 322, 336-37 n.4, 899 P.2d 1251 (1995). Failure to move for suppression of evidence is not per se deficient representation. "Not every possible motion to suppress has to be made" to perform effectively as counsel. *State v. Nichols*, 161 Wn.2d 1, 14, 162 P.3d 1122 (2007). "Counsel may legitimately decline to move for suppression on a particular ground if the motion is unfounded." *Nichols*, 161 Wn.2d at 14. And trial counsel does not need to pursue strategies that appear unlikely to succeed. *McFarland*, 127 Wn.2d at 337. But failure

to bring a plausible motion to suppress may be deemed ineffective if it appears that a motion would likely have been successful if brought. *State v. Meckelson*, 133 Wn. App. 431, 436, 135 P.3d 991 (2006), *review denied*, 159 Wn.2d 1013 (2007).

Valid consent to search is an exception to the warrant requirement. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). In order for a consent to search to be valid (1) the consent must be voluntary, (2) the person consenting must have the authority to consent, and (3) the search must not exceed the scope of the consent. *Walker*, 136 Wn.2d at 682. While R.M.H. correctly points out that when "co-occupants" are involved, the "common authority" standard is appropriate,[3] the parent-child relationship is not analogous to that of co-occupants. Instead, courts look to the broader relationship between the parent and the child to determine the parent's authority to consent to a search of a child's bedroom. *State v. Summers*, 52 Wn. App. 767, 772, 764 P.2d 250 (1988), *review denied*, 112 Wn.2d 1006 (1989).

Normally, a parent has authority over all rooms of the house. *Summers*, 52 Wn. App. at 772. Simply because a child has exercised exclusive control over his or her room is not dispositive; rather, the focus must be on the broader relationship between the parent and child. *Summers*, 52 Wn. App. at 772. Thus, if a child is essentially a dependent, it is irrelevant that the parent has tolerated the child's decisions to make his room his exclusive domain. As an initial matter, "'toleration is not necessarily agreement,'" and even where there is such an "agreement," it is always subject to revocation by the parent, who retains the ultimate power. *Summers*, 52 Wn. App. at 772 (quoting *State v. Carsey*, 295 Or. 32, 42, 664 P.2d 1085 (1983)). In contrast,

[3] To establish lawful consent under the common authority standard, a consenting party must be able to permit the search in his own right, and it must be reasonable to find that the defendant has assumed the risk that a co-occupant might permit a search. *State v. Mathe*, 102 Wn.2d 537, 688 P.2d 859 (1984).

when a child is emancipated, but occupies a room in the parent's home, pays rent, and otherwise manifests his independence from the parent, that child is entitled to the same protections as a tenant. *Summers*, 52 Wn. App. at 772. Whether the relationship is more like that of dependent child and parent or that of tenant and landlord is a factual issue to be determined in each case. *Summers*, 52 Wn. App. at 773. Thus, a third party with the status of a custodial parent can consent to the search of a child's room within that third party's home. *Summers*, 52 Wn. App. at 773. But if the third party's status is more like that of a landlord than a custodial parent, he or she has no authority to consent to a search of the child's room. *Summers*, 52 Wn. App. at 773.

Here, R.M.H. argues that his trial counsel should have moved to suppress the evidence found during the search of R.M.H.'s bedroom because, according to 15-year-old R.M.H., the deputies improperly relied on his mother's consent to search his bedroom. But R.M.H. relies on case law addressing consent in a co-occupancy context only and offers no authority or analysis with respect to consent in the parent-child context. Under *Summers*, a parent has authority to consent to the search of his or her dependent child's bedroom. 52 Wn. App. at 772-73. And R.M.H. has failed to demonstrate that he was anything other than a dependent child living with his custodial parent. R.M.H. was 15 at the time he committed the crimes at issue and there is no evidence that R.M.H. paid his mother rent or that their relationship was otherwise more like a landlord and tenant than a custodial parent and child. Accordingly, R.M.H.'s mother gave valid consent to the deputies to search R.M.H.'s bedroom. Because there was a valid consent to the search, no warrant was required and, thus, it would have been futile for R.M.H.'s trial counsel to move to suppress that evidence. Even if R.M.H.'s trial counsel had moved to suppress this evidence, the trial court would have denied such a motion.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HOUGHTON, P.J.

HUNT, J.